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Report of the International Law Commission on the work of its sixty-third session (2011)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat

Addendum

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II. Topical summary

H. Reservations to treaties

1. General comments

1. The final adoption by the Commission of the Guide to Practice on Reservations to Treaties was generally welcomed, with several delegations looking forward to a substantive discussion on the Guide to Practice and the Commission's recommendations regarding mechanisms of assistance in relation to reservations at the sixty-seventh session of the General Assembly, in 2012.

2. A number of delegations emphasized the usefulness of the Guide to Practice, which was also regarded as a major contribution to the development of the law of treaties. Furthermore, the balanced character of the Guide was commended. While appreciation was expressed for the modifications introduced into the final version of the Guide in order to make it clearer and more user-friendly, a view was expressed that the Guide remained too complicated to provide guidance to practice. The comment was also made that the Guide had departed from its original aim, namely, to elaborate guidelines for the use of practitioners in their daily work. Moreover, a view was expressed that a separate reservations regime should have been developed for international organizations.

2. Specific comments

3. Some comments were made with regard to specific guidelines. For instance, it was observed that late reservations undermined the integrity of multilateral treaties; thus, the soundness of draft guideline 2.3.1, on acceptance of the late formulation of a reservation, according to which the late formulation of a reservation shall be deemed to have been accepted unless a contracting State or contracting organization objected to it within a 12-month deadline, and the correspondence of that guideline to existing law, were questioned. According to another opinion, a mechanism similar to that provided for late reservations should have been developed for late objections. In that regard, some concerns were raised over the ambiguity of guideline 2.6.13, on objections formulated late, according to which an objection formulated late does not produce "all" the legal effects of an objection formulated within the 12-month time period. Some doubts were raised about the usefulness of the guidelines dealing with so-called approvals of or oppositions to interpretative declarations since such reactions to interpretative declarations did not appear to be common practice. Furthermore, it was suggested that subjecting interpretative declarations to conditions of permissibility constituted a legislative exercise rather than an attempt to codify existing rules of international law.

4. Some delegations welcomed the general approach taken by the Commission regarding the treatment of invalid reservations. Support was expressed, in particular, for the distinction drawn in the Guide to Practice between valid and invalid reservations, including with regard to their legal effects. Reference was made, in this context, to the objective nature of the validity or invalidity of a reservation, and support was expressed for the Commission's view that a reservation that does not meet the conditions of formal validity and permissibility is null and void, and therefore deprived of legal effects. According to another opinion, the provisions of the Guide to Practice stating that invalid reservations produce no legal effect did not

necessarily reflect State practice. Several delegations welcomed the deletion of former guideline 3.3.3 on the effect of collective acceptance of an impermissible reservation, about which concerns had been expressed by several States. Support was also expressed for the Commission's decision to delete former guideline 2.1.8 on the assessment by the depositary of the permissibility of a reservation in the event of manifestly impermissible reservations. Concerning the assessment of the permissibility of reservations by treaty-monitoring bodies, it was suggested that only States parties could entrust treaty-monitoring bodies with the task of assessing the scope and permissibility of reservations. A view was also expressed that any such assessment should not be regarded as binding on States parties.

5. Some delegations supported guideline 4.5.3, on the status of the author of an invalid reservation in relation to the treaty, as finally adopted by the Commission. It was observed, in particular, that that provision was well-balanced and capable of preserving the integrity of treaties. According to one point of view, the final version of this guideline deserved support in that it had moved away from a stricter presumption of severability, that is, that the author of an invalid reservation continued to be bound by the treaty without the benefit of the reservation, by recognizing the decisive role of the intention expressed by the reserving State. In contrast, some other delegations, observing that the severability of an invalid reservation was supported by State practice, disagreed with the final wording of draft guideline 4.5.3. It was also observed that guideline 4.5.3 should not be understood as reflecting consistent State practice, and that it required further clarification. Moreover, a view was expressed that the presumption of severability of invalid reservations was incompatible with the principle of State consent.

6. Several delegations welcomed the emphasis that the Commission placed on the reservations dialogue in the annex to the Guide to Practice. According to another opinion, the annex on the reservations dialogue deserved more detailed examination. The point was also made that such a dialogue should remain informal and not be institutionalized.

3. Comments on the recommendations of the Commission

7. Several delegations expressed support for the Commission's recommendation that the Assembly take note of the Guide to Practice and ensure its widest possible dissemination. A suggestion was made that the Assembly seek the views of States on the possibility of transforming the Guide into a convention that would supplement the legal framework established by the 1969 Vienna Convention on the Law of Treaties[1] and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[2]

8. A number of delegations expressed the opinion that the Commission's recommendations on the establishment of a mechanism of assistance concerning reservations to treaties deserved consideration. It was noted by some delegations that certain aspects of such recommendations required further elaboration, in particular with regard to the nature and functioning of the proposed mechanism and

[1] United Nations, *Treaty Series*, vol. 1155, No. 18232.

[2] See *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February-21 March 1986*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.94.V.5), document A/CONF.129/15.

the details of its implementation. It was also observed that the Commission's recommendations in this regard needed to be considered cautiously and that the mandate, powers and financial implications of any mechanism should be carefully examined. Some other delegations expressed opposition or doubts regarding the appropriateness of elaborating a mechanism of assistance concerning reservations. In particular, it was observed that differences of view concerning reservations should be solved through negotiations between contracting States, and the point was also made that technical assistance should be offered only at the request of States. Furthermore, the appropriateness of an independent mechanism composed of experts, as suggested by the Commission, was questioned as possibly interfering with a process that essentially involved States.

9. Regarding the Commission's proposals for the establishment of "observatories" that could be entrusted with the monitoring of reservations to treaties, some delegations favoured the development of such "observatories" at the regional and subregional levels, and possibly also within the Sixth Committee. According to another view, the establishment of such an "observatory" within the Sixth Committee would be ineffective.

I. Responsibility of international organizations

1. General comments

10. Several delegations were of the view that the draft articles on the responsibility of international organizations represented a useful attempt at describing practice and the applicable rules in the area. It was stated that in many respects the draft articles reflected current customary law and that despite the diversity of international organizations, in general terms, the draft articles would provide appropriate responses to the legal issues concerned. At the same time, it was noted by several other delegations that, in some areas, the available practice was relatively sparse and not always consistent. Several delegations welcomed the general commentary to the draft articles and, in particular, the acknowledgment that several of the draft articles tended towards progressive development. It was noted that the general commentary rightly acknowledged that special rules could play a significant role, especially in the relations between an international organization and its members. It was also noted that there had been an increasing number of claims of internationally wrongful acts committed by international organizations. A general framework of rules governing international responsibility needed to be upheld to ensure the rule of law.

11. While some delegations pointed to the necessity for the draft articles on responsibility of international organizations to be coherent with the 2001 articles on the responsibility of States for internationally wrongful acts, some other delegations expressed concerns about their application to international organizations. It was stated that an altogether different approach, one that consisted in categorizing the types of organizations that could be identified and dealing separately with each category, might have been preferable.

2. Comments on specific draft articles

12. The changes introduced during the second reading to draft article 2, Use of terms, were welcomed by several delegations. A remark was also made that, given

the significance of the "principle of specialty" governing the activities of international organizations in their areas of competence, the role of the "rules of the organization" was fundamental.

13. The inclusion of new draft article 5, Characterization of an act of an international organization as internationally wrongful, was welcomed by several delegations. The view was expressed that the provision was particularly helpful in avoiding an incorrect interpretation of draft article 64 on *lex specialis*, namely, that if an act was lawful under the rules of the international organization it would necessarily be lawful under international law.

14. As regards draft article 7, Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization, the point was made that the criterion of "effective control" was logical but that caution was required in assessing such control. According to another remark, there was reluctance to endorse the criterion of "effective control", believing instead that the responsibility of an international organization for acts or omissions by organs or agents placed at its disposal arose from the mere fact of their transfer.

15. The point was made draft article 10, Existence of a breach of an international obligation, was to be understood as making it clear that relations between an international organization and its members were generally governed by international law.

16. The view was expressed that the criterion of "direction and control" in draft article 15, Direction and control exercised over the commission of an internationally wrongful act, should be qualified in order to take the element of effectiveness into account in considering the attribution of an act to an international organization or to a State or States.

17. The remark was made that draft article 17, Circumvention of international obligations through decisions and authorizations addressed to members, had been improved by the omission of any reference to non-binding acts, such as recommendations, taken by an international organization. In terms of another view, draft article 17 appeared redundant in light of the provisions of chapter IV.

18. As regards the provision on circumstances precluding wrongfulness, several delegations expressed doubts as to the appropriateness of the inclusion of draft article 21 on self-defence. Several delegations also expressed reservations about the inclusion of provisions on countermeasures (draft articles 22 and 51 to 57). In particular, the possibility of an international organization taking countermeasures against a member seemed remote. The view was also expressed that the inclusion of draft article 23, *Force majeure*, was merited in the light of emerging practice in the context of the administration of territories. The point was also made that the meaning of the phrase "essential interest", in draft article 25, Necessity, could have been explained. According to another remark, the draft article would have limited practical application.

19. A call was made for a clarification of whether, in subparagraph (b) of draft article 30, Cessation and non-repetition, the need for assurances of non-repetition of an internationally wrongful act applied to preventive measures taken by an international organization.

20. A comment was made criticizing the formulation of draft article 32, Relevance of the rules of the organization, since it meant that an international organization that acted in violation of international law, but in compliance with its rules, would be held internationally responsible even though it was unable to amend its rules.

21. The view was expressed that the obligation to provide compensation for damage caused, as specified in draft article 36, Compensation, was solely that of the organization, and that member States should not be required to indemnify the injured party directly. Instead, as suggested by the new wording of paragraph 1 of the article, international organizations must make provision in their budgets to ensure that they could make reparation for any damages they caused and cover the costs of related disputes. The point was also made that it was unconvincing that draft article 40 insulated member States from subsidiary responsibility for reparation.

22. With respect to paragraph 2 of draft article 45, Admissibility of claims, a remark was made that the traditional elements of diplomatic protection were not fully applicable.

23. As regards paragraph 2 of draft article 49, Invocation of responsibility by a State or an international organization other than an injured State or international organization, a comment was made that the right of an international organization to invoke the responsibility of another State or international organization in connection with a violation of an obligation owed to the international community as a whole should be limited by the organization's powers under its constitutive instrument.

24. The view was expressed that Part Five of the draft articles was useful in that the subject was not covered by the articles on State responsibility. The emphasis, in the second paragraphs of draft articles 58, Aid or assistance by a State in the commission of an internationally wrongful act by an international organization, and 59, Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization, on the fact that a State's participation in an organization's decision-making and implementation of the organization's binding decisions did not, in principle, engage its responsibility, was also welcomed. As regards draft article 61, a preference was expressed for the first reading (draft article 60) formulation, in which the element of "seeking to avoid" complying with one of its international obligations was emphasized. It was also indicated that the reformulation of draft article 62 had not allayed the concern as to a lack of clarity. Moreover, another comment was made noting that the provision did not explain how responsibility would be shared among States that assumed collective responsibility for the internationally wrongful acts of an international organization of which they were members.

25. The inclusion of the *lex specialis* principle, in draft article 64, was welcomed by several delegations as being of importance to the draft articles.

3. Comments on the recommendation of the Commission

26. General support was expressed for the Commission's recommendation to the General Assembly concerning the draft articles, including the possibility of considering, at a later stage, the question of elaborating a convention on the basis of the draft articles.

J. Effects of armed conflicts on treaties

1. General comments

27. There was general support for the approach adopted by the Commission in the draft articles on effects of armed conflicts on treaties. Moreover, support was expressed for the restructuring of the draft articles undertaken during the second reading, which had improved their clarity and readability. At the same time, the comment was made that the Commission should have studied a wider range of State practice, in addition to that of the United States of America and the United Kingdom of Great Britain and Northern Ireland.

2. Articles 1 and 2

28. Several delegations welcomed the inclusion within the scope of the draft articles (as established in draft article 1, Scope) of cases in which only one of the States parties to a treaty was a party to an armed conflict, as well as of the effects of an internal armed conflict on the treaty relations of the State concerned. Doubts remained, however, about the inclusion in the draft articles of non-international armed conflicts, even if the definition of such conflicts was restricted to cases where there was "protracted resort to armed force between governmental authorities and organized armed groups". The view was also expressed that the inclusion of such conflicts was ill-advised since article 73 of the Vienna Convention on the Law of Treaties of 1969 referred only to the outbreak of hostilities between States. Therefore, treaty relations between States during internal armed conflicts were already covered by the Vienna Convention. Another view was given that the possible effects of non-international conflicts on treaties were governed by the provisions on circumstances precluding wrongfulness contained in the articles on the responsibility of States for internationally wrongful acts of 2001. Support was also expressed for the Commission's decision to exclude treaty relations between States and international organizations, or between international organizations, from the scope of the draft articles. However, there was a viewpoint opposing such a decision since host country agreements, for example, could potentially be affected by an armed conflict.

29. Several delegations expressed support for the new definition of armed conflict, set forth in subparagraph (b) of draft article 2, Definitions, based on the definition employed in the case of *Prosecutor* v. *Duško Tadić*. Some other delegations expressed concerns, it being stated that the *Tadić* formulation was a useful reference point but did not fit all contexts, whereas a definition based on common articles 2 and 3 of the Geneva Conventions of 1949 enjoyed near universal acceptance.

3. Articles 3 to 7 and annex

30. General support was expressed for draft article 3, General principle, as reformulated during the second reading. The inclusion of draft article 4, Provisions on the operation of treaties, was welcomed as confirming the proposition that whether a treaty is terminated or suspended as a result of an armed conflict was to be determined in accordance with the law on treaties, taking into account the specifics of the treaty in question. The inclusion of draft article 5, Application of rules on treaty interpretation, was also welcomed as clarifying the sequence of investigating the possible implications on the treaty's susceptibility to termination

or withdrawal or suspension of operation. Several delegations welcomed the reformulation of draft article 6, Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension. However, the point was made that the reference to object and purpose in subparagraph (a) was superfluous, in view of new draft article 5. Disagreement was expressed with the idea that draft article 6 and draft article 7, Continued operation of treaties resulting from their subject matter, operated partially or fully independently of draft article 5. They should, according to that view, be treated as an application of the normal rules of treaty interpretation referred to in draft article 5. Some delegations expressed support for draft article 7 and the inclusion in the annex of the indicative list of treaties whose subject matter involved an implication that they continued in operation, in whole or in part, during armed conflict. It was stated that, together with draft article 10, Obligations imposed by international law independently of a treaty, draft article 7 served to reinforce the stability of treaty obligations. Some other delegations indicated that it would have been more appropriate to focus the analysis on the character of specific treaty provisions in order to determine the continued operation of the treaty, rather than on the categorization of the treaty. Another viewpoint questioned the relevance of the list of categories of treaties, even for indicative purposes; several of the listed categories, such as "Multilateral law-making treaties", were considered vague and could lead to the inclusion of all existing treaties. It was suggested that the reference, in draft article 6, to the subject matter of treaties would have been sufficient.

4. Articles 8 to 10, 12 and 13

31. The comment was made that paragraph 1 of draft article 8, Conclusion of treaties during armed conflict, could have been modelled on draft article 3 to express the principle that the existence of an armed conflict did not ipso facto affect the capacity of a State party to that conflict to conclude treaties. The point was also made that the concept, in paragraph 3 of draft article 9, Notification of intention to terminate or withdraw from a treaty or to suspend its operation, of a "reasonable time" for objecting to the termination or suspension of a treaty could have been clarified, setting criteria for the minimum duration of the period concerned and the possibility of extending it according to the intensity and the nature of the armed conflict. The option of specifying in the notification a date on which it would take effect was considered preferable. It was also stated that the draft did not make sufficient provision for the legal consequences of an objection, or for the possibility of a dispute between States. A further concern was that draft article 9 appeared to be applicable to all treaties, including treaties establishing borders, which meant that it could be misconstrued as encouraging a State engaged in an armed conflict and eager to alter its borders to invoke the provision. The point was also made concurring with the position that customary international law applied independently of treaty obligations, as provided by draft article 10. A preference was expressed for a formulation of subparagraph (b) of draft article 12, Loss of the right to terminate or withdraw from a treaty or to suspend its operation, which would have required that the conduct of the State be judged in the light of all the factors prevailing in the situation of armed conflict, since the possibility of tacit consent was difficult to apply in such circumstances. The comment was made expressing difficulty with the concept of unilateral resumption of the operation of a treaty provided for under paragraph 2 of draft article 13, Revival or resumption of treaty relations subsequent to an armed conflict, it being noted that treaties terminated or suspended as a

consequence of armed conflict should be resumed solely on the basis of the agreement of the parties thereto.

5. Articles 14 to 16

32. While the inclusion of draft article 14, Effect of the exercise of the right to self-defence on a treaty, was welcomed, a suggestion was made that it could also have provided for the termination of treaties. The inclusion of draft article 15, Prohibition of benefit to an aggressor State, was also welcomed. However, the view was expressed in favour of a broader formulation referring to the use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations. In terms of a further view, draft article 15 should not be construed to mean that illegal uses of force that fell short of aggression would necessarily be exempt from the provision. The point was made expressing doubts about the newly broadened scope of draft article 16, Decisions of the Security Council. The suggestion was also made that provision could have been made for the case of States targeted by sanctions regimes imposed by the Security Council.

6. Comments on the recommendation of the Commission

33. While several delegations expressed support for the elaboration of a convention on the basis of the draft articles, some other delegations expressly opposed it. Still other delegations advised taking a cautious approach whereby the draft articles could first be adopted in a non-binding form annexed to a General Assembly resolution. The next step would be to convene an international conference, once it had been seen that States were applying them in practice, and that the rules contained therein were widely accepted.